

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1051

UNITED STATES OF AMERICA,
PETITIONER,

vs.

SALVATORE FINAZZO and DOMINIC J. LICAVOLI,
RESPONDENTS.

**BRIEF FOR RESPONDENT
SALVATORE FINAZZO IN OPPOSITION**

QUESTION PRESENTED

1. May federal law enforcement agents, in executing a valid court order authorizing the interception of oral communications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code 2510, *et seq.*, use forcible surreptitious entry to install the devices in the absence of express prior judicial approval?

ARGUMENT

Although Respondent Finazzo concedes that this Honorable Court has granted *certiorari* to review the decision of the United States Court of Appeals for the Third Circuit in *United States v. Dalia*, 575 F.2d 1344 (3rd Cir. 1978), Respondent Finazzo does not agree with the Government's assertion that the Court's determination of the issues in *Dalia, supra*, will control the proper resolution of this case. The Government has neglected to point out that the decision of the Third Circuit in *Dalia* is extremely brief with virtually no independent analysis contained therein.

In contrast to the brusque treatment by the Third Circuit in *Dalia, supra*, of the important issue as to whether federal law enforcement agents may employ forcible surreptitious entry to install electronic listening devices without prior express judicial scrutiny, the decision of the Sixth Circuit in the present matter below contains an extensive amount of intricate and involved statutory and constitutional analysis. The Government has also neglected to point out that the Ninth Circuit has also recently considered this issue and has ruled very similarly to the decision of the Sixth Circuit in the present matter. See *United States v. Santora*, 583 F.2d 453 (9th Cir. 1978).

In *United States v. Santora, supra*, the District Court had expressly authorized the Governmental agents to employ forcible surreptitious entry to install the electronic listening devices. On appeal, the Ninth Circuit held that neither Title III, nor any other federal statute, nor the Fourth Amendment to the United States Constitution, empowers the Federal Courts to authorize forcible surreptitious entry to install electronic listening

devices. *United States v. Santora, supra*, at 462. The Ninth Circuit expressly cited the decision of the Sixth Circuit in the present matter below as supportive authority for the proposition that neither Title III nor any other statute empowers district courts to authorize forcible surreptitious entry.

As stated by the Ninth Circuit in *United States v. Santora, supra*, the decision of the Third Circuit in *United States v. Dalia, supra*, reached its conclusion without any review or analysis of the legislative history of Title III or the decisions of this Court which were an integral part of the legislative history of Title III. As further stated by the Ninth Circuit, the decision of the Third Circuit in *Dalia, supra*, contains virtually no independent analysis of the issues whatsoever.

Given the extensive nature of the Sixth Circuit's opinion in the present matter, coupled with the fact that the decision of the Third Circuit in *Dalia, supra*, contains virtually no independent analysis whatsoever, it is not clear at all that a resolution of *Dalia* will necessarily be a fair presentation of this matter or necessarily control this matter. It is sufficient to state that the decision of the Sixth Circuit in the present matter is far more sophisticated and far more reflective of the actual complexity of the issues involved than is the decision of the Third Circuit in *Dalia, supra*. Accordingly, Respondent Finazzo would respectfully urge this Court to deny outright the Government's Petition for Writ of *Certiorari* since the decision of the Sixth Circuit in the present matter is fully consistent with the legislative history of Title III and with the decisions of this Court in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967), *inter alia*.

On the other hand, if this Court is inclined to grant the Government's Petition for Writ of *Certiorari* to review the decision of the Sixth Circuit in this matter, then it is respectfully submitted that the present matter should be set down for plenary consideration and full oral argument since the decision of the Third Circuit in *Dalia* is hardly an ideal vehicle by which the full ramifications of the issues involved may be discussed. Given the Sixth Circuit's extremely more sophisticated analysis of the issues involved contained in the present matter and the decision of the Ninth Circuit in *Santora*, it is respectfully submitted that this Honorable Court should have the benefit of considering these complex issues with the aid of the present matter being given full plenary consideration. To "hold" the present matter pending the Court's ultimate decision in *Dalia* would be closely akin to letting the tail wag the dog given the extremely sophisticated analysis bestowed upon these issues by the Sixth Circuit in the present matter and the virtual lack of independent analysis employed by the Third Circuit in *Dalia*.

CONCLUSION

The Petition for Writ of *Certiorari* should be denied, or in the alternative, that if *certiorari* is granted, that this matter be given full plenary consideration together with full oral argument.

Respectfully submitted,

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